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No. 58

In the Supreme Court of the United States

OCTOBER TERM, 1957

LEE YOU FEE, BY LEE Q. PON, HIS NEXT FRIEND,
PETITIONER

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

J. LEE RANKIN,
Solicitor General,
RUFUS D. McLEAN,
Acting Assistant Attorney General,
BEATRICE ROSENBERG,
ROBERT G. MAYBACK,
Attorneys,
Department of Justice, Washington 25, D. C.

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 56–62) is reported at 236 F. 2d 885. The opinion of the District Court is reported at 133 F. Supp. 160.

JURISDICTION

The judgment of the Court of Appeals was entered on September 26, 1956 (R. 63). The petition for a writ of certiorari was filed on December 21, 1956. The petition was granted on June 10, 1957 (R. 64). 354 U. S. 908. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner, born in China of a United States citizen father, lost his citizenship under Sec-

tions 201 (g) and (h) of the Nationality Act of 1940 by failure to apply for, or take up, residence in the United States prior to his sixteenth birthday on July 16, 1951, at which time the consulate in Hong Kong, where petitioner resided, had been receiving travel applications for five years.

2. Whether Sections 301 (b) and (c) of the Immigration and Nationality Act of 1952, which permit retention of American citizenship by persons born abroad subsequent to May 24, 1934, provided they come to the United States prior to their twenty-third birthdays, are applicable to petitioner.

STATUTES INVOLVED

Section 201 of the Nationality Act of 1940 (54 Stat. 1138; 8 U. S. C. 601 (1946 ed.)) provided in pertinent part:

> The following shall be nationals and citizens of the United States at birth:
>
> * * * * *
>
> (g) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years, the other being an alien: *Provided,* That, in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: *Provided further,* That, if the child has not taken up a residence in the United States or its outlying possessions by the time

he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease.

* * * * * *

(h) The foregoing provisions of subsection (g) concerning retention of citizenship shall apply to a child born abroad subsequent to May 24, 1934.

These provisions were repealed by Section 403 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 279, 280.

Section 301 of the Immigration and Nationality Act of 1952 (66 Stat. 235; 8 U. S. C. 1401) provides as follows:

(a) The following shall be nationals and citizens of the United States at birth:

* * * * * *

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided*, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.

(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a), shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United States for at least five years: *Provided,* That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

(c) Subsection (b) shall apply to a person born abroad subsequent to May 24, 1934: *Provided, however,* That nothing contained in this subsection shall be construed to alter or affect the citizenship of any person born abroad subsequent to May 24, 1934, who, prior to the effective date of this Act, has taken up a residence in the United States before attaining the age of sixteen years, and thereafter, whether before or after the effective date of this Act, complies or shall comply with the residence requirements for retention of citizenship specified in subsections (g) and (h) of section 201 of the Nationality Act of 1940, as amended.

Section 405 (c) of the Immigration and Nationality Act of 1952 (66 Stat. 280; 8 U. S. C. 1101 note) provides as follows:

Except as otherwise specifically provided in this Act, the repeal of any statute by this Act shall not terminate nationality heretofore lawfully acquired nor restore nationality heretofore lost under any law of the United States or any treaty to which the United States may have been a party.

STATEMENT

Petitioner filed in the United States District Court for the Eastern District of Wisconsin a complaint for declaratory judgment, seeking recognition of his alleged United States citizenship (R. 2–13). The substance of the complaint was as follows:

Petitioner was born in China on July 16, 1935, of a Chinese mother and a father who was a citizen of the United States (R. 3, 4, 6). In 1936, petitioner's father returned to the United States where he had permanent residence in Milwaukee, Wisconsin (R. 4). Petitioner's mother died on March 3, 1945, and he was left under the care of her relatives at Hong Kong (R. 5, 57).

From December 7, 1941, through December 26, 1946, the United States Consulate at Hong Kong was closed to applications for travel papers for the purpose of coming to the United States (R. 4). Petitioner alleged that because of conditions beyond his control he was prevented from making application for travel to the United States before his sixteenth birthday on July 16, 1951. These conditions were said to include unsettled post-war emergency conditions in Hong Kong, and the inability of petitioner and his father to raise funds for his trip to the United States (R. 8–9, 31–32). On October 17, 1951, and again on December 11, 1951, petitioner's application for travel to the United States was disapproved by the consulate at Hong Kong on the ground that it had not been timely filed before petitioner's sixteenth birthday (July 16, 1951), and he had lost his United States citizenship (R. 8–9).

On motions for summary judgment, the District Court dismissed the complaint (R. 25–26, 41, 52). The decision (R. 47–51) was to the effect that, under Sections 201 (g) and (h) of the Nationality Act of 1940 (*supra*, pp. 2–3), petitioner had lost his American citizenship by failing to take up residence in the United States prior to his sixteenth birthday (July 16, 1951), and that the limitation of the statute was not tolled by lack of proper financing or troubled world conditions. The District Court also held that the pertinent savings clause of the 1952 Act (Section 405 (c), *supra*, p. 4) was applicable, so that petitioner's citizenship, lost under the 1940 Act, remained lost and was not restored under Section 301 (b) of the 1952 Act, *supra*, p. 4.

On appeal, the Court of Appeals affirmed, holding that petitioner's citizenship, lost prior to the effective date of the 1952 Act, had not been restored by Sections 301 (b) and (c) of that Act; and that subsection (c) was limited to persons "born abroad subsequent to May 24, 1934, who, prior to the effective date of [the 1952 Nationality] Act, had taken up a residence in the United States [as petitioner had not] before attaining the age of sixteen years * * *."

SUMMARY OF ARGUMENT

I

Petitioner lost his American citizenship, under Sections 201 (g) and (h) of the Nationality Act of 1940 (*supra*, pp. 2–3), by reason of his failure to take up residence in the United States prior to his reaching the age of 16 years on July 16, 1951. The grant of citizenship in the 1940 Act was subject to the condi-

tions subsequent (a) that in order to retain his citizenship the child "must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years", and (b) that "if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years * * * his American citizenship shall thereupon cease". Since petitioner did not comply with either of these conditions he lost his citizenship.

There was no showing that the requirement for taking up United States residence prior to the sixteenth birthday was tolled because of conditions making it impossible for petitioner to comply with the statute. He and his relatives had ample opportunity from 1946 to 1951 to ask the Hong Kong Consulate for travel papers to keep alive his claim for retention of citizenship. The fact that this consulate was closed to applications for travel to the United States between December 1941 and December 1946, while petitioner was between the ages of six and eleven, could not relieve him of the statutory requirement that he reach the United States prior to his sixteenth birthday, or at least make the appropriate application after the consulate reopened in December 1946.

II

The real issue in the case is whether, although petitioner had lost his citizenship under the 1940 Act, Sections 301 (b) and (c) of the 1952 Act (*supra*, p. 4) gave him an opportunity to regain that citizen-

ship by coming to the United States before he was twenty-three years of age. We now believe that petitioner's position is correct and that our contrary position below was incorrect. Section 301 (c) states in terms that the new rule established by Section 301 (b) as to losing citizenship unless one has come to the United States prior to attaining the age of twenty-three "shall apply to a person born abroad subsequent to May 24, 1934." Petitioner was in fact "born abroad subsequent to May 24, 1934"—*i. e.*, he was born on July 16, 1935. Literally, the section covers his case.

The legislative history likewise supports petitioner's position that Sections 301 (b) and (c) were actually intended to be applicable to *all* children of an American citizen-parent born abroad after May 24, 1934. These provisions were originally recommended in Senate Report 1515, 81st Cong., 2d Sess., filed on April 20, 1950. At that time, no child born after May 24, 1934, could yet have lost his citizenship by failure to take up residence before his sixteenth birthday (although that possibility was only a month away). The committee report stated, p. 713:

> Inasmuch as adjudication and determination of cases coming under the provisions of existing law [*i. e.*, the 1940 Act] have not yet begun, the subcommittee recommends that the proposed new law be made retroactive to include children born abroad subsequent to May 24, 1934, which is the date used in the 1940 Act.

Further support is given petitioner's position by the detailed analysis and comment by the Immigration

and Naturalization Service on the proposed 1952 Act; at page 301–5 of that analysis, this statement is made:

> Although subsection (b) refers specifically to persons born abroad who are citizens under paragraph (7) of subsection (a), *the apparent effect of subsection (c) is to apply the rules for retention of citizenship contained in subsection (b) to all persons born abroad subsequent to May 24, 1934.* [Emphasis added.]

On this view, the question becomes whether the language of Section 301 (c), applying Section 301 (b) to "a person born abroad subsequent to May 24, 1934", can in the light of its legislative history be said to be a clause which brings this case within the "except as otherwise specifically provided" portion of Section 405 (c)—a savings clause of the 1952 Act which provides against restoration of American nationality theretofore lost, "except as otherwise specifically provided in this Act." We think the language and legislative history of Section 301 (c) do sufficiently indicate a Congressional intent to cover all persons born after May 24, 1934, so that Section 301 (c) should properly be treated as a specific provision rendering the general savings clause inapplicable. The determination of whether a particular section comes within the "otherwise specifically provided" part of a general savings clause requires not any particular form of language, but rather only a clear expression of Congressional purpose. *Lehmann* v. *Carson*, 353 U. S. 685; *Mulcahey* v. *Catalanotte*, 353 U. S. 692.

DISCUSSION

I. PETITIONER LOST HIS UNITED STATES CITIZENSHIP, UNDER THE NATIONALITY ACT OF 1940, BY FAILING TO APPLY FOR, OR TAKE UP, RESIDENCE IN THE UNITED STATES PRIOR TO HIS SIXTEENTH BIRTHDAY

There can be little question, in our view, but that petitioner lost his United States citizenship under Sections 201 (g) and (h) of the Nationality Act of 1940 (*supra*, pp. 2–3) by reason of his failure to apply for, or take up, residence in the United States prior to his reaching the age of 16 years on July 16, 1951. The 1940 Act granted citizenship at birth to a child born in a foreign country if one parent was a United States citizen and certain residence requirements were met. This grant of citizenship, however, was not absolute but was subject to the conditions subsequent that (a) such a person, in order to achieve "retention" of his citizenship, "must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years," and that (b) "if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years * * * his American citizenship shall thereupon cease." Petitioner did not comply with these conditions and therefore lost his citizenship, since it is undisputed that he did not establish a residence in this country prior to his sixteenth birthday, and did not even apply for travel facilities before that date.[1]

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[1] For a discussion of these provisions of the 1940 Act, see Senate Report No. 1515, 81st Cong., 2d Sess. ("The Immigration and Naturalization Systems of the United States"), April 20, 1950, at pp. 690–691.

The issue which petitioner attempts to raise, as to whether the requirement for taking up United States residence prior to the sixteenth birthday may be tolled where conditions beyond the child's control make it impossible for him to comply with the statute, is not presented by this case. Petitioner, his father, and his mother's relatives had ample opportunity from 1946 to 1951 to petition the Hong Kong Consulate for travel papers in order to keep alive his claim for retention of citizenship. Even if they did not have sufficient finances for a trip in 1946, they could at least have made application for travel documents, with the hope of raising the money later. Petitioner's failure to make a timely application for travel to the United States was not involuntary in any real sense of the word, but was due to his own failure and that of his family. Moreover, the fact that the United States Consulate in Hong Kong was closed to applications for travel to the United States between December 1941 and December 1946, while petitioner was between the ages of *six* and *eleven*, certainly could not relieve him of the statutory requirement that he reach the United States prior to his sixteenth birthday, or excuse his failure to apply after the consulate reopened in December 1946. It should also be noted that under the 1940 Act the five years' residence in the United States had to occur after the age of thirteen.

Petitioner's strong reliance upon *Lee Hong* v. *Acheson*, 110 F. Supp. 60 (N. D. Cal), is misplaced. There, completely unlike the situation here, the plaintiff made application to the American Consulate at Hong Kong "for travel documents more than five

months prior to his sixteenth birthday," but by reason of the State Department's unwarranted delay they "were issued only 37 hours prior to the beginning of the day on which plaintiff would attain the age of sixteen" (110 F. Supp. at 63). For these reasons it was held that the plaintiff had substantially complied with Section 201 (g) of the 1940 Act by making a bona fide attempt to take up timely residence in the United States.

Petitioner also relies upon *Perri* v. *Dulles,* 206 F. 2d 586 (C. A. 3), and *Paduzzi* v. *Brownell,* 113 F. Supp. 419 (D. D. C.), arising under Section 401 (a) of the Nationality Act of 1940, which provides that an American child who acquires foreign nationality through a naturalized parent is required to come to the United States within two years after his majority or lose his American citizenship. In each of these cases, however, the statute was deemed tolled since World War II was being waged and consulates were closed during most of the pertinent time interval. Furthermore, a short two-year statute, instead of the much longer period provided in Section 201 (g), was involved. As the District Court appropriately observed here (R. 49), "It should be noted that the Second World War did not directly interfere with [petitioner's] coming to the United States before he was sixteen years old."

II. PETITIONER'S CITIZENSHIP WAS RESTORED BY SECTIONS 301 (b) AND (c) OF THE IMMIGRATION AND NATIONALITY ACT OF 1952

The real issue in this case is whether, although petitioner had lost his citizenship under the 1940 Act (Point I, *supra,* pp. 10–12), Sections 301 (b) and (c) of the 1952 Act (*supra,* p. 4) gave him an op-

portunity to regain that citizenship by coming to the United States before he was twenty-three years of age. We now believe that petitioner's position on this issue is correct and that our contrary position below was wrong.

A. Section 301 (c) of the 1952 Act states that the new rule, in Section 301 (b), as to losing citizenship unless one has come to the United States prior to attaining the age of twenty-three "shall apply to a person born abroad subsequent to May 24, 1934." Petitioner falls within the four corners of this provision since he was born on July 16, 1935, and will not attain his twenty-third birthday until July 16, 1958. However, Section 405 (c) of the 1952 Act also provides:

> Except as otherwise specifically provided in this Act, the repeal of any statute by this Act shall not terminate nationality heretofore lawfully acquired nor restore nationality heretofore lost under any law of the United States or any treaty to which the United States may have been a party.

On the face of the statute, reading the two sections together, it can reasonably be said that, as the court below held, Section 405 (c) operates to render inapplicable to petitioner—who had already lost his citizenship (in July 1951) before the effective date of the 1952 Act (December 1952)—the provisions of Section 301 (c), despite the literal terms of the latter provision.

The legislative history—which was unfortunately not presented to the court below—does, however, support petitioner's position that Sections 301 (b) and

(c) of the 1952 Act were intended to be applicable to *all* children of an American citizen-parent born abroad after May 24, 1934. These provisions were originally recommended in the broad study of the working of the immigration and nationality laws reported in Senate Report No. 1515, 81st Cong., 2d Sess. ("The Immigration and Naturalization Systems of the United States"), which was filed by the Senate Committee on the Judiciary on April 20, 1950. At that time, no child born after May 24, 1934, could yet have lost his citizenship by failure to take up residence before his sixteenth birthday, although that possibility was only a month away. The committee report stated, p. 713:

> The subcommittee finds that the provisions of existing law relative to citizenship of children born abroad of a citizen parent or parents are confusing and difficult to administer and interpret, particularly with reference to residence requirements, both of parents and children.
>
> *Inasmuch as adjudication and determination of cases coming under the provisions of existing law have not yet begun,* the subcommittee recommends that the proposed new law be made *retroactive* to include children born abroad subsequent to May 24, 1934, which is the date used in the 1940 act. [Emphasis added.]

In view of the closeness of the date of the report (April 20, 1950) to the first possible date for loss of citizenship under the 1940 Act (May 24, 1950), the reference in the report to the fact that "determination" of cases had not begun and the recommendation that the new provisions be made "retroactive" re-

flects, we think, an intention to apply the new rules to all persons born after 1934, even those who might otherwise lose citizenship under the provisions of the 1940 Act.

In the two years which intervened between Senate Report No. 1515 and the enactment of the Immigration and Nationality Act of 1952, no mention was made of the fact that some children born after 1934 could have (and, like petitioner, actually had) lost citizenship under the 1940 Act before the 1952 Act became effective. But further support is given petitioner's position by the detailed analysis and comment prepared by the Immigration and Naturalization Service, to which reference is made in Senate Report 1137, 82d Cong., 2d Sess., p. 3, and House Report 1365, 82d Cong., 2d Sess., pp. 27–28. This analysis from the Immigration and Naturalization Service states, at page 301–5:

> Although subsection (b) refers specifically to persons born abroad *who are citizens* under paragraph (7) of subsection (a), the apparent effect of subsection (c) is to apply the rules for retention of citizenship contained in subsection (b) to *all persons* born abroad subsequent to May 24, 1934. The latter date is the date of an act (48 Stat. 797) which for the first time applied conditions for the retention of citizenship in the case of a child born abroad to parents, each of whom is an alien. The rules for such retention in subsection (b) are different from those under sections 201 (g) and (h) of the 1940 Act and some persons will be in the process of fulfilling the 1940 rules when this bill takes effect. However, it appears from the lan-

guage of the proviso to subsection (c), that any person who was a citizen under the Act of May 24, 1934, and who has already commenced the necessary action for retention of citizenship specified in the relevant provisions of the 1940 Act, will be permitted to complete such action on his part without any loss of citizenship. [Emphasis added.]

This comment is directed primarily at the problem of those covered by the proviso to subsection (c) who were already in the process of meeting the residence requirements under the 1940 Act and who would, under that Act, complete those requirements at a date earlier than under the 1952 Act. Nevertheless, the statement that the apparent effect of subsection (c) is to apply the new rule to "*all* persons" would suggest that persons in petitioner's position came within the purview of subsection (c). While there is no specific indication that the problem of the limited group who had already lost citizenship (under the 1940 Act) since May 24, 1950, was in the minds of the legislators, it could also be said that, if the problem had occurred to anyone, he might well have thought, on the basis of the comments of the Immigration and Naturalization Service and of the Senate Judiciary Committee, that provision had been made for allowing such persons to remain citizens if they complied with the new, more liberal, requirements of the 1952 Act.

That the more liberal provisions of the 1952 Act were intended to become applicable is also attested by the fact that Congress has, over the years, consistently liberalized the provisions relating to retention of citizenship by a child born outside the United

States, one of whose parents is an American citizen. The Act of May 24, 1934, 48 Stat. 797, required such a child to come to the United States no later than his 13th birthday, if he wished to maintain his citizenship. The Nationality Act of 1940, 54 Stat. 1137, 1139, Sec. 201 (g), raised the age of coming to the United States to 16, and Section 201 (h) provided that the new requirements of Section 201 (g) "shall apply to a child born abroad subsequent to May 24, 1934"—thus covering all children previously governed by the 1934 Act. In its turn, the 1952 Act raised the age to 23. Thus, the Congress has revealed an increasingly liberal attitude toward such children born abroad.

B. On this view, the issue becomes whether the language of Section 301 (c), applying Section 301 (b) to a "person born abroad subsequent to May 24, 1934," can in the light of its legislative history be said to be a clause which brings this case within the "except as otherwise specifically provided" portion of Section 405 (c), the relevant savings clause quoted above at p. 13.

The history of the savings clause in Section 405 (c) fails to throw any light on the subject. All the bills introduced had some similar form of savings clause, but the introductory phrase of the final draft, *i. e.*, the "except as otherwise specifically provided" clause, was not inserted until the conference. House Report 2096, 82d Cong., 2d Sess. No explanation appears in the reports or debate. Also, it cannot be assumed that the phrase "except as otherwise specifically provided" was inserted in Section 405 (c) solely to take care of persons whose citizenship was to be restored by Sec-

tion 301 (c), since it appears that citizenship was to be restored under at least one other provision, Section 354 (1).

While neither the language nor the history of Sections 301 (c) and 405 (c) can be said to be conclusive on the problem, we think the terms and background of Section 301 (c)—as discussed above—do sufficiently indicate a Congressional intent to cover *all* persons born after May 24, 1934; so that that subsection should properly be treated as a specific provision rendering the savings clause in Section 405 (c) inapplicable. In *Mulcahey* v. *Catalanotte*, 353 U. S. 692, and *Lehmann* v. *Carson*, 353 U. S. 685, dealing with the savings clause in Section 405 (a) of the 1952 Act, the government took the position (as petitioner does here) that the determination of whether a particular section comes within the "otherwise specifically provided" part of a savings clause requires, not any particular form of language, but rather only a clear expression of Congressional purpose.[2] In both of those cases, this Court followed that suggestion and held that the savings clause was rendered inapplicable by specific provisions of Section 241 of the 1952 Act relating to new grounds for deportation of aliens. Similarly, in *Shomberg* v. *United States*, 348 U. S. 540, the Court held that provisions of Section 318 of the 1952 Act, rather than the savings clause, were controlling. In *Shomberg*, the Court took cognizance of a "congressional purpose" and an "intent [which

[2] See the government's briefs in *Catalanotte* (No. 435, O. T. 1956, pp. 12–16) and in *Lehmann* (No. 72, O. T. 1956, pp. 11–12).

was] plain enough" (at p. 545) and held, "We would be lax in our duty if we did not give recognition also to the congressional purpose to override the savings clause when other considerations were thought more compelling than the preservation of the status quo" (at pp. 547–548).[3] In the instant case, although the language of Sections 301 (b) and (c) is not as explicit as that in the sections involved in *Catalanotte, Lehmann,* and *Shomberg, supra,* it sufficiently discloses a Congressional purpose, revealed by the legislative history, to override the savings clause of Section 405 (c) so as to make the more liberal terms of the new Act available to all persons born after May 24, 1934, including those who had lost their citizenship between May 24, 1950, and December 24, 1952, the effective date of the 1952 Act.

CONCLUSION

For the reasons stated in Point II, *supra,* it is respectfully submitted that the judgment of the Court of Appeals was in error and should be reversed, and that the case should be remanded to the District Court.

J. LEE RANKIN,
Solicitor General.

RUFUS D. MCLEAN,
Acting Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

NOVEMBER 1957.

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[3] For cases holding the savings clause (rather than specific provisions of the 1952 Act) applicable, see *United States* v. *Menasche,* 348 U. S. 528; *Wong Kay Suey* v. *Brownell,* 227 F. 2d 41 (C. A. D. C.), certiorari denied, 350 U. S. 969.

U. S. GOVERNMENT PRINTING OFFICE: 1957